[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

September 13, 1939.

PUBLIC PROSECUTOR v. TANGA MUTHU.

[TEMERLOH MAGISTRATE'S CRIMINAL APPEAL No. 2 of 1939]

Penal Code, S. 354—indecent assault on child—sentence.

In the case of assault with intent to outrage modesty and of other sexual offences against children the imposition of a fine only is not adequate punishment and the appropriate sentence should be one of rigorous imprisonment.

MAGISTRATE'S CRIMINAL APPEAL.

A. J. Grattan-Bellew, Ag. Deputy Legal Adviser, for Public Prosecutor.

Respondent in person.

The facts and arguments sufficiently appear from the Judgment below.

Poyser, C.J.—The respondent was originally charged with the attempted rape of a six-year old girl. The Magistrate after hearing the evidence came to the conclusion that there had been no attempt by the respondent to have actual intercourse with the child, but only an indecent assault, and the charge was therefore altered to one under section 354 of the Penal Code. The respondent then pleaded guilty, and was sentenced to a fine of $50 in default one month's rigorous imprisonment.

The fine has not been paid. The appeal is by the Public Prosecutor who asks the Court to enhance the sentence on the following grounds:—

(a) The Magistrate failed to appreciate the serious nature of the accused's acts towards the child, or the possible consequences of such acts on the mental outlook of the child.

(b) The Magistrate failed to take into consideration the age of the child.

(c) The sentence is inadequate and manifestly wrong.

I agree with the Public Prosecutor that to impose a fine in a case of this description is manifestly wrong. It is unnecessary on appeal to refer to the revolting details of the respondent's conduct; it is only necessary to state that it is at least open to doubt whether the conviction should not have been for attempted rape. I regard sexual offences against children as offences which should be most severely dealt with. It is true that the child in this case suffered no physical injuries, but she may have sustained irreparable moral injuries.

I enhance the sentence to one year's rigorous imprisonment, such sentence to date from the conviction by the Magistrate, *viz:* the 18th of August 1939.

Appeal allowed. Sentence enhanced.

[WORKMEN'S COMPENSATION]

RADCLIFFE, COMMISSIONER.

RE NARASAMAH DECEASED.

[PERAK WORKMEN'S COMPENSATION FILE No. 44 of 1939]

Workmen's compensation—weeding coolie—death by lightning—whether accident arose in the course of employment.

A female coolie engaged on weeding work on a rubber estate was killed by lightning which ran down a tree against which she was leaning during a heavy downpour of rain.

Held, that as the deceased by her employment as a weeding coolie on a rubber estate was exposed to no substantially greater danger of being struck by lightning than any other person who happened to be in that locality at the material time, the accident did not arise out of and in the course of her employment.

Cases referred to:—

(1) *Adamson v. George Anderson & Co. (1905) Ltd.,* (1913) W. Comp. Cas. 508.

(2) *Andrew v. Falsworth Industrial Society,* (1904) 73 L.J. 510.

(3) *Warner v. Couchman,* (1912) 81 L.J.K.B. 45.

WORKMEN'S COMPENSATION CLAIM.

C. R. Forsyth, Assistant Controller of Labour, for the Applicants, Appamah (f) and Malee.

H. R. Rix for the Respondent Employers, Cicely Rubber Estates Co., Ltd., Teluk Anson.

Radcliffe, Commissioner.—This has been by no means an easy case to decide and I am gratified to find Lord Loreburn saying in one of the cases cited to me.

> "There cannot be imagined a more difficult part of this act to determine upon than that which relates to what are injuries arising out of and in the course of the man's employment".

(*Warner v. Couchman*[3]). Nevertheless my task has been made appreciably easier by the assistance that I have received from the Assistant Controller

of Labour, appearing on behalf of the applicants, and from Mr. Rix, appearing for the respondent employers. Both have taken great pains to bring to my attention all the law that they could find on the subject whether in their favour or against them.

2. The facts on which I must base my finding are to all intents and purposes agreed. The one witness called by the Assistant Controller of Labour merely amplified the facts already agreed and was not cross-examined on any material issue. The deceased woman Narasamah at the time of her death was one of a party of weeding coolies engaged on weeding work on a rubber estate. A few minutes before she died the party had been compelled to stop work owing to a heavy downpour of rain. They ran for shelter and Narasamah and the only witness called, a woman named Kannamah, got under a tree. Narasamah was actually leaning up against the tree when it was struck by lightning. The flash ran down the tree, splitting it in two and breaking off a branch, and it then passed through Narasamah and killed her. It also killed a dog and burnt the clothes of the witness Kannamah causing her considerable shock.

3. The claim to compensation is brought by the Assistant Controller of Labour on behalf of the two infant children of the deceased woman Narasamah who it is alleged were partially dependant on her earnings at the time of her death. The issue that I have to decide is whether Narasamah's death was an accident arising out of and in the course of her employment. I have no hesitation in holding that it arose in the course of her employment. This is obvious from the facts already set out, and, indeed, Mr. Rix did not seek to contend otherwise. The point really to be decided is "Is this an accident arising out of the woman's employment?". The principles which I must follow in making up my mind on this point are very clearly set out in the judgment of the County Court Judge for Oldham in what must be regarded as the leading case on this subject,— *Andrew v. Falsworth Industrial Society*[1]. The learned Judge says:

> "We know that lightning is erratic and possibly no position or circumstances can afford absolute safety. But if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the normal risk which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of the employment; and if in consequence of that extra danger a fatality occurs, I am entitled to say that the section applies and the applicant is entitled to recover".

This judgment was quoted with approval by Collins, M. R. on the hearing of the appeal, who said that he could not improve upon it, and it has frequently been cited since. The same thing was said, in a slightly different way, by Lord Johnston nine years later in the Scotch case of *Adamson v. George Anderson & Co. (1905) Ltd.*,[1].

> "In these cases", he said, "the risk is a common normal risk, and the question broadly put is whether the workman's exposure to it is abnormal or excessive by reason of his employment".

In other words the question I must ask myself here is "Was this woman exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunder storm?" Before I can find in favour of these applicants I have to be satisfied that being struck by lightning is one of the risks to which a person using a rubber plantation is exposed to a greater degree than a person using, for example, an open field. The Assistant Controller of Labour argued that this was so. He said it was common knowledge that lightning was a frequent occurrence in Malaya and that trees were dangerous things to be near when lightning was playing. He then went on to point out that the work of the coolie working on a rubber estate forced him to remain habitually in close proximity to trees. From this he said that I must hold that workmen like the deceased woman Narasamah were exposed to greater risk of being injured by lightning than, say, workmen in towns. Now I am afraid I cannot follow him this far. We all know that lightning is frequent in this country, but this merely means that we who live here are all possibly slightly more exposed to injury from it than people who live in other countries where it is less frequent. We also all know that lightning seems to be attracted by trees, but here I take leave of the Assistant Controller. I do not think that I am entitled to say that it is common knowledge that lightning is attracted more by trees than by any other object which happens to come between it and the ground. I certainly do not think that without expert evidence I am entitled to hold that thousands of trees all about the same height will attract lightning to a greater degree than, say, an open field or a flat tin mine. The chances of lightning hitting the particular tree which this woman was standing under must be very remote indeed, as remote certainly as the chances of it hitting any particular house in a town. If the Assistant Controller of Labour had been able to call evidence showing that there is a higher degree of mortality from lightning on rubber estates than, for example, on tin mines, the matter might have been

different. As it is I can only use my common sense and apply it to such common knowledge as I feel I am entitled to assume. Doing this I am unable to come to the conclusion that this woman by her employment as a weeding coolie on a rubber estate was exposed to any substantially greater danger of being struck by lightning than any other person who happened to be in that locality at that particular time. Indeed it might well be argued that because of the large number of trees by which she was surrounded (as opposed to being under the shelter of an isolated one) she was less exposed to danger than a person in the same locality who was not so situated.

4. Naturally arbitrators under any system of Workmen's Compensation Law have tended to construe the law as far as possible in favour of the workman, but there must be limits to this and to my mind this is one of them. I do not think that this accident arose out of and in the course of this woman's employment and the application is dismissed. I have no power to order costs against the Assistant Controller or the dependants and in any event I am quite sure that Mr. Rix would not ask for them.

Application dismissed.

[APPELLATE CIVIL JURISDICTION]

GORDON-SMITH, Ag. J.A.

October 3, 1939.

CHAN CHOU HAR

v.

CHAN PHOOI HOONG (No. 2).

[SELANGOR CIVIL SUIT No. 100 of 1939]

Civil Procedure Code, Chapter XXXIX., Ss. 212, 213—summary procedure—cross-examination of deponent on affidavit—order for—whether open to review—English Rules relating to summary procedure held inapplicable in the Federated Malay States.

Once the Court has properly exercised its discretion in making an order under Sections 212 and 213 of the Civil Procedure Code that a deponent do appear for cross-examination on his affidavit, the order is not open to review by a higher tribunal.

The English rules relating to summary procedure and the practice thereunder (Order 14 of the Rules of the Supreme Court) are not relevant in proceedings under Chapter XXXIX of the Civil Procedure Code (Summary Procedure).

Cases referred to:—

(1) *Abrahams v. Dunlop Pneumatic Co.*, (1905) 1 K.B. 46.

(2) *Fuller & Co. v. Alexander Bros.*, (1882) 52 L.J.Q.B. 103.

(3) *Millard v. Baddelley*, (1884) W.N. 96.

APPEAL from the decision of the Registrar dated 8th September 1939, ordering the defendant to appear for cross-examination on his affidavit.

After remission of case by Cussen, J., to the Registrar, plaintiff filed an affidavit in which she alleged that certain statements, contained in the affidavit of the defendant in support of his application for leave to appear and defend, were false, and would so appear upon his cross-examination thereon. The Registrar ordered the defendant to attend for cross-examination on his affidavit. The defendant appealed.

M. N. Cumarasami for the defendant-appellant:—

Defendant's affidavit entitles him to unconditional leave to defend. He should not have been ordered to appear for cross-examination. If he does not appear, there is nothing in Section 212 or 213 of C.P.C. which prevents his affidavit from being read in evidence. O.38, r.l. corresponds with our Section 213. See note in Yearly Practice headed "To what Rule applies." *Abrahams v. Dunlop Pneumatic Co.*,(1). The Registrar had no jurisdiction to try the merits or truth of the affidavit. In requiring defendant to appear for cross-examination, he has acted without jurisdiction or has exercised his discretion wrongly. Defendant is entitled to unconditional leave to defend without being cross-examined on his affidavit. O.14, r.l. *Millard v. Baddeley*, (3) *Fuller & Co. v. Alexander Bros.*,(2).

Joaquim for the plaintiff-respondent, in reply. Our Section 460 differs in its requirements from O.14, r.l. Defendant's counsel repeats the arguments used before Cussen, J., and which were decided against him. The case was sent back to Registrar to deal with it according to the directions of Cussen, J. He has done this and has exercised his discretion on the evidence before him. The reported decisions show that an Appellate Court will not readily interfere with an exercise of discretion. (*Joaquim* stopped by Court).

Cur. Adv. Vult.

Gordon-Smith, Ag. J.A.—This was an appeal by the Defendant against the Order of the Registrar dated the 18th September, 1939, whereby the Defendant was ordered to attend for cross-examination on his affidavit of the 28th July, 1939.

There has been a previous appeal from an Order of the Registrar of the 3rd August, 1939, under which said Order the Registrar had given conditional leave to defend. This previous appeal was heard by Cussen, J., who allowed the appeal and remitted the matter